

UNCLAS SECTION 01 OF 05 GENEVA 002614

SIPDIS

PASS USTR FOR DWOSKIN
STATE/EB/OT FOR CRAFT
USDA/FAS/ITP FOR SHEIKH, MTND/HENKE, FAA/SE/WILSON
USDOC FOR SPETRINI, JACOBS, LORENTZEN

E.O. 12958: N/A
TAGS: ETRD WTRO USTR
SUBJECT: 22-30 SEPTEMBER 2005 MEETINGS OF THE WTO RULES
NEGOTIATING GROUP

SUMMARY

11. The WTO Rules Negotiating Group held three days of plenary meetings to discuss eight papers on antidumping issues and two papers related to fisheries subsidies. There were also plurilateral meetings for more in-depth discussions of selected elaborated antidumping proposals. Two U.S. papers, on causation and on the lesser duty rule, were discussed in the meetings. The Chairman reiterated his concern over the Group's ability to manage the large number of antidumping proposals and emphasized the importance of bringing greater focus to the discussions through the use of draft texts in written proposals. The Chairman also appointed a New Zealand delegate to serve, on an ad hoc basis, as a facilitator in the plurilateral meeting to discuss the U.S. causation paper. The next round of Rules Negotiating Group meetings is scheduled for the weeks of 17 and 24 October 2005.

ANTIDUMPING AND
COUNTERVAILING MEASURES

Plenary Session

Chairman's Concern re
Number of Proposals

12. Rules Negotiating Group Chairman Guillermo Valles Galmes began the plenary session by expressing concern over the number and nature of the elaborated proposals received. (Note: There is a three-step process for considering proposals. Written negotiating proposals are introduced formally to the Negotiating Group, elaborated for discussion in an informal plenary session, and then, if appropriate, and at the discretion of the chairman, more closely scrutinized in a plurilateral meeting. End note.) Valles said he is concerned about the group's ability to manage the large number of proposals, observing that issues were still being raised for the first time. There were eleven elaborated proposals for consideration at this meeting and there were many high priority issues that have not yet been elaborated. The negotiating group therefore was in danger of having superficial discussions of many proposals, rather than detailed discussions of the key issues. The Chairman urged Members to exercise restraint by limiting proposals to address high priority issues or issues where compromise is possible. He also said that the discussions needed to be more focused and pragmatic, through the use of concrete text-based proposals.

Public Interest Determination

13. Hong Kong China introduced a paper from a subset of the Friends of Antidumping Negotiations (Friends) entitled "Further Submission on Public Interest," (circulated as TN/RL/GEN/53). (Note: The paper was co-sponsored by Israel, Japan, Korea, Norway, Singapore, Switzerland, Chinese Taipei and Thailand. Chile was not co-sponsor, but intervened orally in support of it. Neither Japan nor Brazil said much in support of the proposal. Brazil has privately commented that it was reluctant to adopt the formalized procedures outlined in the proposal, even though its Council of Ministers makes "public interest" determinations. End note.) The proposal would require authorities to make a determination whether the application of an anti-dumping measure is in the "economic interest" of the Member, based upon a specified list of factors. It also includes provisions relating to the procedures to be applied by authorities in reaching its determination, designed to incorporate comments of the importers, consumers and downstream users, but not those of the domestic industry.

14. The European Communities said a public interest determination should be required as a contribution to "good governance." The public interest "economic balancing" test must be limited to analyzing the economic effects of antidumping measures, because non-economic considerations (foreign policy, environmental, social, etc.) could lead to discriminatory application of measures in violation of ADA Article 9.2. The EC registered concerns about the possible application of the WTO Dispute Settlement system to public interest determinations, even if the scope of such reviews were to be limited only to procedural aspects. The United States expressed its concern that the dispute settlement body could be asked to overrule a Member state's determination of what it considers to be in its own

"public interest," and noted the absence of guidelines in the proposal for assessing comments received.

Changed Circumstances Reviews

15. Japan introduced an elaborated proposal from the Friends entitled "Proceedings under Article 11.2," circulated as TN/RL/GEN/52. The proposal would make it easier to obtain Article 11.2 changed circumstances reviews and would introduce certain presumptions that would increase the likelihood that measures would be terminated. The EC questioned the underpinning of the proposals, by noting that the paper ignored the key issue involved- whether the "change" in circumstances was a temporary development, a result of the imposition of the measure, or a permanent change justifying the revocation or modification of the measure. The U.S. intervention focused on the proponents' failure to take into account the different contexts involved in original investigations and in reviews, where measures are already in place.

Causation of Injury

16. The United States introduced its enhanced proposal, entitled "Causation (ADA Article 3.5; ASCM Article 15.5), circulated as TN/RL/GEN/59. The proposal would reaffirm that an authority is not required to determine that dumped imports are the sole cause of injury to the domestic industry, nor must it quantify nor weigh the various factors contributing to the injury. The authority would be required to examine known factors other than dumped imports and provide a reasoned explanation that, notwithstanding any other contributing factors, dumped imports have made a material contribution to the injury or threat thereof.

17. The U.S. proposal attracted relatively mild criticism from the Friends, who had previously submitted a proposal that would make the causation test much more stringent. The Friends argued that the U.S. proposal focused on what investigating authorities did not need to consider in making their analysis of causation of injury, rather than on what should be considered and the standard to be applied. Several Members asked for clarification of terms used in the proposal, including the meaning of "weighing," "isolating" and "material contribution." Brazil endorsed the general thrust of the paper, but raised several questions about it. Australia, Canada, Egypt, India, China made generally positive comments, but also posed specific questions. The EC was relatively non-committal in posing questions for clarification.

Product under Consideration Cumulation

18. Brazil introduced two papers address interrelated topics, "Proposal on Product under Consideration," circulated as TN/RL/GEN/50, and "Proposal on Cumulation," circulated as TN/RL/GEN/51. (Note: The Product under Consideration paper was co-sponsored by Chile, Israel, Korea, Singapore, Switzerland and Thailand; the Cumulation paper was co-sponsored only by Brazil, Switzerland and Thailand.) Neither proposal attracted much support or interest from the group, with several Members questioning how an investigating authority would be able to make a determination of the "product under consideration," as proposed by Brazil. They noted that the kind of detailed information about conditions of competition contemplated by Brazil for defining product subject to an investigation is not generally available to authorities before initiation. The United States also noted the practical difficulty customs officials would have in enforcing a measure based on such non-physical criteria. Several Members also questioned why imports should be mandatorily cumulated in determining causation of injury, and the rationale for not cumulating imports from different investigations that are destined for different geographical areas or at a different time.

Transparency

19. Norway presented its paper entitled "Proposal on Issues Relating to Evidence, Public Notice and Explanation of Determinations under Articles 6 and 12 of the ADA," circulated as TN/RL/GEN/49. (Note: Norway privately said the proposal is meant to address procedural deficiencies in the EC system that became apparent during its history of antidumping investigations of Norwegian salmon. End note.) The twelve-page Norwegian proposal would impose stringent procedural requirements on investigating authorities with respect to the identifying foreign exporters and producers, obtaining information, assisting respondents in providing information, and conducting verifications. It would also require that reasoned explanations be provided for non-acceptance of any information provided by respondents.

110. The United States expressed its general support for improving transparency in antidumping investigations and noted that some of the items the U.S. had previously proposed were included in the Norwegian paper. However, some of the Norwegian proposals had been drafted without regard to the practical constraints under which authorities operate and particular

aspects were simply unworkable. The EC said it favored improvements in transparency, but then launched into a point-by-point critique of Norway's proposal. They concluded by saying that many of the items raised in the proposal were capable of resolution in the Committee on Antidumping Practices Working Group on Implementation, and that hours would be required to resolve each of the items in the proposal. Some developing countries predictably emphasized the costs and burdens for their authorities.

U.S. Comments on Lesser Duty Proposals

¶11. The United States gave a brief presentation of the paper entitled "Further Comments on the Lesser Duty Proposals," circulated as TN/RL/GEN/58. The paper identifies U.S. concerns regarding proposals, from the Friends and from India, to require the application of the so-called "lesser duty rule." The paper notes that the methodologies proposed for defining "margin of injury" do not take into account the factors that the antidumping agreement provide for defining whether or not injury exists. The paper also raises concerns with respect to the complexity and costs involved in requiring a lesser-duty analysis, and with the non-transparent practices that are currently being used by some Members that purport to apply the lesser duty rule.

¶12. The European Communities recognized that U.S. concerns with respect to a mandatory lesser duty rule were serious and deserved consideration. However, the EC has been applying the lesser duty rule for years and has not experienced any obstacles that were not insurmountable. The EC was willing to address the concerns of others and wanted to make the lesser duty rule part of the standard practice of all antidumping users. Japan, Brazil, Chile, Hong Kong, India, Korea, Turkey, and Peru expressed support for making the application of the lesser duty rule mandatory. Indonesia, Argentina and Egypt expressed reservations about making the application of the lesser duty rule mandatory. Thailand suggested the possibility of allowing Members to apply different lesser duty methodologies, as long as the methods applied were transparent and predictable.

¶13. During the discussion, several proponents acknowledged that the "margin of injury" they were advocating as a limit to the applied antidumping duty bore no relationship to the overall injury being suffered by the domestic industry. In response, the United States replied that if the "injury margin" does not in fact address actual injury, then the application of the lesser duty rule is really industrial policy to regulate imports and would not appear to meet the requirement, under Article 9.1 of the Antidumping Agreement, that the lesser duty "would be adequate to remove the injury to the domestic industry."

Sunset Review

¶14. Canada introduced its paper, entitled "Sunset Reviews," circulated as TN/RL/GEN/61. The Canadian proposal calls for procedural changes in the conduct of sunset reviews, rather than the imposition of a mandatory revocation after a stated period. (Note: The Friends have advocated mandatory revocation after five years. End note.) The EC supported the proposal, although it acknowledged that it might have some problems with particular details. The EC expressed concern that other Members have been renewing antidumping orders automatically, against the spirit of the antidumping agreement. Several other Members, including the United States and Thailand, expressed general support for the paper and posed some technical questions. Some Friends recalled their joint proposal for the automatic revocation of orders after 5 years. Brazil posed a technical question about the Canadian proposal, without referring back to the Friends' proposal for automatic revocation.

Plurilateral Sessions

¶15. Plurilateral meetings were held for more detailed and focused technical discussions of the U.S. paper on causation and the Friends' papers on changed circumstances reviews, public interest and sampling. Prior to the discussion of the U.S. paper on causation, Rules Group Chairman Valles recalled his desire to focus better the discussions in the plurilaterals meetings, by limiting discussions in the sessions to specific proposed texts. He announced his intention to ask some participants, in their personal capacities as "friends of the chair," to facilitate the discussions. The facilitators would be nominated on an ad hoc basis for particular issues, in consideration of the technical complexity of the subject and the need to retain balance. The nomination of a facilitator to assist on a topic is not meant to impart any particular status to the issue under discussion. The Chairman then named Bruce Cullen, a New Zealand delegate, acting as a "friend of the chair," to facilitate the discussion of the U.S. paper on causation. The Chairman also noted that he intended to "vary the geometry of the participation in the discussions." (Note: The plurilateral meeting to discuss the U.S. causation paper was attended by the United States, EC, Canada, Australia, New Zealand, Japan, Hong Kong China, Brazil, Korea, Argentina, India, Egypt and China. End note.)

Aquaculture

¶16. The Negotiating Group had a plenary meeting to resume its discussion of a paper from Australia, New Zealand and Ecuador entitled "Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies - Aquaculture," circulated as TN/RL/GEN/54 (1 July 2005). New Zealand re-introduced the paper by observing that the Group's July discussion as reflecting Members' views that aquaculture would not be expressly covered in strengthened disciplines, both because current rules were adequate to address it and strengthened rules on wild fisheries would discipline the areas where there was a potential link between wild and farmed fisheries (e.g., use of wild fish as feedstock for fish farms). New Zealand, however, emphasized the growing importance of the sector and cautioned that Members should not lose sight of the possibility of circumvention of strengthen rules on wild fisheries through a shifting of subsidies to aquaculture. The EC expressed agreement with the sense of the room that aquaculture was not the target of new disciplines and that its consideration would further complicate the negotiations. China and India intervened briefly to reaffirm their view that aquaculture should not be included.

Architecture of Disciplines

¶17. Solomon Islands introduced a paper entitled "Architecture on Fisheries Subsidies Disciplines," circulated as TN/RL/GEN/57/Rev.2 (13 September 2005) on behalf of Members characterizing themselves as "small vulnerable coastal states." (The paper was co-sponsored by Antigua and Barbuda, Barbados, the Dominican Republic, Fiji, Grenada, Guyana, Jamaica, Papua New Guinea, St. Kitts and Nevis, St. Lucia, the Solomon Islands, and Trinidad and Tobago. End note.) The paper describes the dependency of these countries on foreign aid and argues that several types of programs should be carved out from new disciplines: (1) development assistance; (2) assistance to artisanal or small scale fisheries; (3) access fees through fisheries access agreements; and (4) fiscal incentives to facilitate development of these Members' coastal fisheries (such as support for processing facilities). The Solomon Islands called for an express footnote to Article 1 of the SCM Agreement to exclude development assistance from the definition of subsidy. While the co-sponsors expressed neutrality as between the "top down" and "bottom up" approaches, so long as they were exempted, their interventions - even more than the paper itself - emphasized several themes associated with the bottom up (Japanese) approach: skepticism about the use of the traffic light approach and the WTO's competence to fashion new disciplines.

¶18. A number of delegations were active in the discussion that followed, including India, Sri Lanka, Mauritius, Thailand and Turkey. They essentially called for special and differential treatment (S&D) provisions that would exclude them from strengthened disciplines, although some (Thailand, Turkey) indicated that these provisions should be part of overall strengthened disciplines. Several delegations, including Peru and Chile (Friends of Fish), raised concerns with the co-sponsors' apparent press for creating a new category of developing countries while other Members, most notably Korea, urged that any S&D treatment only be granted to small economies that are "too small to have an impact on fish stocks." Chinese Taipei noted that the top down approach would rule out the possibility of any flexibility ("policy space") for developing countries to develop their fisheries in the future. Japan also argued that the concerns of the co-sponsors could best be addressed by the bottom up approach and emphasized aspects of the paper that supported its position, e.g., the statement that subsidies were not harmful if given in a sustainably managed fishery.

¶19. Brazil stated that two aspects of the paper were consistent with its position: the importance of conservation measures and the ability for developing countries to develop their fisheries. New Zealand stressed that the top down approach provided ample flexibility to address the co-sponsors' concerns and expressly stated that development assistance and access payments should be exceptions to new disciplines. In an important caveat, New Zealand stressed that the country receiving an access payment was not the focus of these negotiations; rather, the concern was with the country providing the payment and only if it did not recover the cost of the payments from its industry that benefits from the access. New Zealand also made the point that de minimis provisions need further exploration - a point that the US and others have begun to contemplate as a way to focus the negotiations.

¶20. The European Community said Members needed to "minimize the intrusiveness of strengthened disciplines," in addition to S&D provisions, adding that it was "terrible" that the co-sponsors would have to come to Geneva to justify their subsidies. The EC also suggested that a discussion of S&D treatment should not wait until after the general strengthened disciplines are identified. [COMMENT: This intervention appeared to align the EC more closely

with the Japanese/Korean position than in previous meetings.] The United States stated that the top down approach could address the concerns raised by the co-sponsors and emphasized the progress the negotiations had made, taking note of the technical work on specific fisheries categories and Brazil's contribution.

¶21. There was reconfirmation in the room that special and differential treatment is a critical element of strengthened disciplines and that the co-sponsors, as small economies, would likely be accorded such treatment. There was concern, however, about the interpretation of what is meant by small-scale and artisanal fisheries. At the request of some of the paper's co-sponsors, the Secretariat will prepare a compilation of definitions of artisanal and small-scale fisheries used in various fora. Shark